84-469

Office Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER 1984 TERM

STEWART W. WILLIAMS,

PETITIONER,

v.

VIRGINIA NATIONAL BANK,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO
THE COURT OF APPEALS OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the order of the Court of Appeals of Washington, dismissing the appeal below, void for lack of notice?
2. Does Rule RAP 18.9(b) of the Rules of Appellate Procedure of the State of Washington violate the due process clause of the U.S. Constitution?
3. Are the judgment of the Superior Court of Washington for King County, and the Virginia judgment it enforces, void for illegal service of process by the Virginia court?
4. Are the said judgments void for insufficient notice by the Virginia court?
5. Does Virginia's long-arm statute, which sets no time limit for service on the out-of-state defendant, violate the due process clause of the U.S. Constitution?

APPLICABILITY OF 28 U.S.C. §2403(b)

This Petition draws into question the constitutionality of the State of Virginia's long-arm service statute, VA. CODE §8.01-329 (1981 Cum. Supp.), and the State of Washington's court rule RAP 18.9(b), Rules of Appellate Procedure. Thus 28 U.S.C. §2403(b), regarding intervention by the Attorney General of the interested state, may be applicable and a copy of this Petition shall be served upon the Attorneys General of Virginia and Washington.

TABLE OF CONTENTS

Questions Presented for Review..... ii

Applicability of 28 U.S.C. §2403(b).. iii

Table of Contents..... iv

Table of Authorities..... v

Reference to Opinions Below..... viii

Grounds of This Court's Jurisdiction. 1

Constitutional Provisions Which the Case Involves..... 2

Statement of the Case..... 3

Argument..... 9

Appendix..... 27

TABLE OF AUTHORITIES

Page

Cases

Addison v. Salyer,
40 S.E.2d 260 (S.C. App. VA 1946).. 18

Barber Asphalt Paving Co. v. Std. Asphalt & Rubber Co., 275 US 372, 48 S.Ct. 183, 72 L.Ed. 318 (1928).. 9

Beritich v. Starlet Corp.,
69 Wn.2d 454, 418 P2d 762 (1966)... 14

Brown v. Brown,
46 Wn.2d 370, 281 P2d 850 (1955)... 17

Fuentes v. Shevin,
407 US 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)..... 9

Griffin v. Draper,
32 Wn.App. 611, 649 P2d 123 (1982). 15

Holland Furnace Co. v. Willis,
149 S.E.2d 93 (1966)..... 24

Humphreys v. Pierce,
512 F.Supp. 1321 (W.D. VA 1981).... 21

Industrial Finance Co. v. Lovell,
9 Wn.App. 829, 515 P2d 1304 (1973). 17

King County Republican Central Com. v. Republican State Com.,
79 Wn.2d 202, 484 P2d 387 (1971)... 14

Maple v. Maple,
29 Wn.2d 858, 189 P2d 976 (1948)... 17

Martin v. Huston,
11 Wn.App. 294, 522 P2d 192 (1974). 10

Mullane v. Central Hanover B&T Co.,
339 US 306, 70 S.Ct. 652, 94 L.Ed.
865 (1949)..... 24

Roller v. Holly,
176 US 398, 20 S.Ct. 410, 44 L.Ed.
520 (1900)..... 23

State v. Ashbaugh,
90 Wn.2d 432, 583 P2d 1206 (1978).. 12

State v. Johnston,
17 Wn.App. 486, 564 P2d 1159 (1977) 17

Streater v. White,
26 Wn.App. 430, 613 P2d 187 (1980). 15

Stubbs v. Hamilton,
135 N.W.2d 540 (1965)..... 25

Williams v. Steamship Mut. Etc.,
45 Wn.2d 209, 273 P2d 803 (1954)... 17

Western Union v. Pettyjohn,
13 S.E. 431 (S.C. App. VA 1891).... 19

Windsor v. McVeigh,
93 US 274, 23 L.Ed. 914 (1876)..... 10

Constitutional Provisions

U.S. CONST. Art. 3, §1..... 2

U.S. CONST. Art. 3, §2, clause 1..... 1, 2

U.S. CONST. Art. 4, §1..... 2, 6

U.S. CONST. Art. 6, clause 1..... 2

U.S. CONST. Amend. V..... 2, 7

U.S. CONST. Amend. XIV, §1..... 2

Statutes and Rules

RAP 1.2(a)..... 14

RAP 9.2(a)..... 15

RAP 17.7..... 13

RAP 18.8(b)..... 14

RAP 18.9..... 11

U.S. Supreme Court Rule 17.1(b) & (c) 1

VA. CODE, vols. 2 & 4..... 18

VA. CODE §8.01-295..... 18

VA. CODE §8.01-328.1..... 20

VA. CODE §8.01-329..... 21

VA. CODE §16.1-69.6(4) & (7)..... 17

VA. CODE §16.1-69.7..... 17

VA. CODE §16.1-77..... 18

VA. CODE §16.1-79..... 18

VA. CODE §16.1-80..... 23

28 U.S.C. §1257(3)..... 1

28 U.S.C. §2101(c)..... 1

Textbooks

Restatement of Conflict of Laws §25, Comment h..... 23

REFERENCE TO OPINIONS BELOW

(all unpublished)

February 17, 1984 No. 50210-2

Supreme Court, State of Washington

Disposition: Petition for Discretionary Review denied.

December 5, 1983 No. 13499-0-I

Washington Court of Appeals, Division 1

(three-judge panel)

Disposition: Motion for reconsideration denied.

October 24, 1983 No. 13499-0-I

Washington Court of Appeals, Division 1

Disposition: Motion to Modify Commissioner's Ruling denied.

September 8, 1983 No. 13499-0-I

Washington Court of Appeals, Division 1

Disposition: Appeal dismissed by Commissioner's Ruling for failure to perfect record and appearance of abandonment.

June 17, 1983 No. 81-2-11058-4

Superior Court of King County, Washington

Disposition: Motion for Reconsideration denied on finding the Virginia court had subject matter and personal jurisdiction and that its procedure afforded sufficient notice and opportunity to defend.

February 5, 1982 No. 81-2-11058-4

Superior Court of King County

Disposition: Motion To Show Cause Why Default Judgment Should Not Be Vacated denied.

June 9, 1981 No number

Norfolk General District Court, Civil Division, State of Virginia

Disposition: Default judgment for $3,014.45. (Filed in King County Superior Court July 27, 1981.)

GROUNDS OF THIS COURT'S JURISDICTION

a. The judgment sought to be reviewed is the denial of Petition for Discretionary Review by the Supreme Court of the State of Washington, No. 50210-2, February 17, 1984, entered at 10:55 AM.

b. A petition for writ of certiorari by this Court is timely if filed within 90 days of the decision sought to be reviewed, pursuant to 28 U.S.C §2101(c). A properly attested mailing within the time limit substitutes for filing. Ninety days have not yet elapsed since February 17, 1984.

c. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(3), United States Supreme Court Rule 17.1(b) & (c), and U.S. CONST. Art. 3, §2, clause 1.

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

U.S. CONST. Art. 3, §1:

> The judicial Power of the United States, shall be vested in one supreme Court....

U.S. CONST. Art. 3, §2, clause 1:

> The judicial Power shall extend ... to Controversies ... between Citizens of different States....

U.S. CONST. Art. 4, §1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State....

U.S. CONST. Art. 6, clause 1:

> This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. Amend. V:

> No person shall be ... deprived of life, liberty, or property, without due process of law....

U.S. CONST. Amend. XIV, §1:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

a. The Facts

Stewart Williams, while residing in Newport News, Virginia, bought a used car from a local dealer and financed it through the local branch of Virginia National Bank. He moved to Seattle, Washington and fell behind in his payments. The bank's agent found the car at Mr. Williams's Seattle residence, repossessed it there, and sold it at Seattle, all without making prior demand as is required by the security agreement and, apparently, several decisions of this Court and others.

Mr. Williams wishes his day in court to assert the illegality of the repossession and the commercial unreasonability of the resale amount ($3,600 for a car he says is worth $6,000), and to recover about $3,000 of garnished wages as well as damages in tort. He is blocked by a Vir-

ginia default judgment that Washington courts have either upheld or refused to review.

The bank demanded payment of a contract deficiency. Instead of suing Mr. Williams in Seattle, Washington, where he resided, the bank sued for a deficiency judgment in Virginia, not in a court of general jurisdiction but in a court of limited jurisdiction, the Norfolk General District Court. That court's jurisdictional boundaries are the city limits of Norfolk, where the bank has its credit recovery department. The contract sued on, however, was made in Newport News with the Newport News branch. Mr. Williams never resided in Norfolk, and none of his transactions with the bank or the auto dealer took place in Norfolk.

The Virginia court set a hearing date two weeks away and issued process in the

form of a Warrant in Debt, which Virginia law allows to be served as late as 5 days before the hearing date. By the time he was actually served by certified mail, Mr. Williams had nine days to respond. He asserts that it was impossible for him to respond in time. When he failed to appear, the court entered a default judgment for $3,014.45. The bank's Washington attorney filed it as a foreign judgment in King County.

King County Superior Court denied a motion to vacate the default judgment and a subsequent motion for reconsideration. On the second motion, the court made findings that the Virginia court had both subject matter and personal jurisdiction and that its long-arm service satisfied the requirements of due process.

Appeal was filed. Sometime later Mr. Williams's attorney received the court clerk's notice that a Statement of

Arrangements was due or otherwise a "court's motion to dismiss and/or impose sanctions or terms" would be heard the Friday after the due date. Inadvertently the date was missed; the court dismissed the appeal with no further notice; and the dismissal was upheld on reconsideration and on appeal to the Supreme Court of Washington, the state's court of last resort.

b. Federal Questions--When and How Raised

The bank invoked U.S. CONST. Art. 4, §1, in the court of first instance in its response to Mr. Williams's initial motion to vacate:

> "The court is urged to deny defendant's motion because the Full Faith in [sic] Credit Clause of the United States Constitution requires this court to honor the Virginia judgment, because the defendant has shown no grounds entitling him to vacate the judgment, and because defendant's show cause order was improperly served."

Memorandum in Resistence [sic] to Show Cause, Nov. 4, 1981, p. 3.

Replying in a memo, Mr. Williams referred to U.S. CONST. Amend. V:

"The due process clause of the United States Constitution requires that a defendant be given notice of a lawsuit brought against him and an opportunity to be heard. United States Constitution, Fifth Amendment and Fourteenth Amendment.

"...[T]hese long-arm statutes are limited by the afore-discussed due process requirements."

Memorandum of Defendant in Support of Motion To Vacate Default Judgment, Jan. 13, 1982, p. 3.

The court considered the federal issues in its findings on reconsideration:

"On this record, and under the arguments and the venue statute advanced by the plaintiff in support of the judgment, it would appear to me that the Virginia court had both personal and subject matter jurisdiction.

"On the record, it appears that the defendant was afforded sufficient due process, in that there was both notice and an opportunity to defend the action."

Renewed Motion To Vacate Default, Court Reporter Transcript, June 17, 1983, p. 2.

On the issue of dismissal of the appeal, the federal due process question was raised in Mr. Williams's reply brief to the Supreme Court of Washington:

> "3. The Court of Appeals Commissioner's Ruling Dismissing Appeal was entered without proper notice in violation of the Rules of Appellate Procedure and in violation of procedural due process of law under both the State and Federal Constitutions."

Reply to Answer to Petition for Review, Feb. 15, 1984, p. 6. Presumably the Supreme Court considered the federal issue although in denying review it made no findings of fact. Order No. 121/41, Supreme Court of the State of Washington, Feb. 17, 1984.

The above discussion shows that the federal questions sought to be reviewed in this Court were timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

ARGUMENT

a. The Judgment of the Supreme Court of Washington, Dismissing the Appeal Below, Is Void for Lack of Notice.

The crux of the appeal argument is that defective notice to counsel denied Mr. Williams his opportunity to be heard. Procedural due process includes the right to be heard "at a meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 US 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (US FL 1972), rehearing denied 409 US 902, 93 S.Ct 177, 34 L.Ed.2d 165.

The notice did not conform to the time requirement in the existing court rules. A court's freedom to vary or ignore its own rules and practices without review from above is limited by the requirement that the complaining party not be injured by such variance. Barber Asphalt Paving Co. v. Standard Asphalt &

Rubber Co., 275 US 372, 48 S.Ct. 183, 72 L.Ed. 318 (1928) (sudden reversal of procedure, although technically allowed by existing rule, held error because of hardship it caused in presenting a party's case); Windsor v. McVeigh, 93 US 274, 23 L.Ed. 914 (1876) (where court's variance in procedure denies opportunity for hearing, its judgment is void).

Washington recognizes the danger to due process in its judicial standards for considering dismissal of an appeal for noncompliance with the rules. The appellate court must consider: timeliness and ultimate purpose of the motion; demonstrated prejudice to the moving party; and the effect of the motion on the nonmoving party if granted. Martin v. Huston, 11 Wn.App. 294, 522 P2d 192 (1974).

The notice referred to is a letter from the Appeals Court Clerk, dated August 17, 1983, informing petitioner Williams

that a Statement of Arrangements was due by September 1, 1983 and cautioning that

> "In the event this item is not accomplished by the due date, a court's motion to dismiss and/or impose sanctions or terms will be heard at 9:30 A.M. on the Friday following 09/01/83....
>
> "Counsel's failure to comply with the Rules of Appellate Procedure will result in the imposition of sanctions pursuant to RAP 18.9."

RAP 18.9(b) requires 30 days notice to the parties of dismissal of an appeal on the motion of the commissioner or clerk. The period from August 17 to the hearing date of September 2 was only 16 days, yet on this defective notice the court applied its most severe sanction.

According to the August 17 letter, the event that would trigger the court's motion for hearing was lack of a response by September 1--an event yet to occur at the time the only "notice" of it was given. The Clerk's letter at most should be considered only a general warning of

what might occur. Lacking the signature of a judge or commissioner, it was not a court directive. For proper notice, the court should have set a hearing date and informed counsel after the failure of compliance occurred on September 1.

The court's order of September 8 also cited the grounds of abandonment, authorized under RAP 18.9(c):

> "(c) **Dismissal on Motion of Party.** The appellate court will, on motion of a party, dismiss review of a case (1) for want of prosecution if the party seeking review has abandoned the review...."

Section (c) has no 30-day notice requirement, but this rule is inapplicable because it relates to a motion of a party, not of the court.

In addition, dismissal for abandonment requires clear evidence. In State v. Ashbaugh, 90 Wn.2d 432, 583 P2d 1206 (1978), the State Supreme Court emphasized that

"...the right to appeal is a constitutional right. Consequently, any waiver of that right via the alleged abandonment of an appeal must be knowing, intelligent, and voluntary."

The court made no findings of fact regarding abandonment. By the Appeals Court Clerk's letter of September 8, the petitioner was advised he could move to modify the Commissioner's Ruling pursuant to RAP 17.7. When he made a timely motion to modify accompanied by all the submissions required to perfect the appeal, it became clear that he had no intention of abandoning the appeal.

A close reading of RAP 18.9, attached as an appendix, shows an internal inconsistency. 18.9(b) authorizes dismissal "as provided in section (a)"; but 18.9(a) says <u>nothing</u> <u>whatever</u> about dismissal. The only sanctions it mentions are terms and damages. How, then, could this dismissal "pursuant to RAP 18.9" be procedurally valid when terms and damages

are the only authorized sanctions?

Even ignoring the defects in RAP 18.9, it must be read in the light of RAP 1.2(a), as follows:

> (a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in Rule 18.8(b).

RAP 18.8(b) refers only to restrictions on motions for extension of time and does not apply to this case.

Clearly RAP 1.2(a) states the sound policy of deciding cases on their merits, not on technicalities. It is consistent with prior decisions of the Washington Supreme Court in King County Republican Central Com. v. Republican State Com., 79 Wn.2d 202, 484 P2d 387 (1971), and Beritich v. Starlet Corp., 69 Wn.2d 454, 418 P2d 762 (1966).

Filing of the Statement of Arrangements was governed by RAP 9.2(a), which allows 45 days "after acceptance of review." Because the Clerk's letter did not state an acceptance date, one could reasonably conclude it was the date of the letter, August 17. (The material was filed September 26, well within 45 days after that date.) The ambiguity of the letter, even if it be accepted as proper notice, raised reasonable doubt as to the effective date, and all doubts in the appeals process are to be resolved in favor of the petitioner. Streater v. White, 26 Wn.App. 430, 613 P2d 187 (1980); Griffin v. Draper, 32 Wn.App. 611, 649 P2d 123 (1982).

In summary, the Commissioner's Ruling dismissing the appeal is void because it deviated, to the petitioner's detriment, from the notice time required and the motion procedure set by the court's own

rules. Its subsequent affirmances by the Court of Appeals and the State Supreme Court do not sanctify it: a judgment void from the beginning remains void.

b. The Superior Court judgment and the Virginia judgment it enforces are void for illegal service of process by the Virginia court.

Once the appeal is found valid, this Court may consider the validity of the underlying judgments. One might speculate that Washington's higher courts took refuge in a technicality to avoid standing in judgment over a sister state's procedure. The dispute is a classic one for this Court, however, and is important for its relation to the Court's long line of cases developing the due-process standards for long-arm jurisdiction.

The Full Faith and Credit Clause is open to exceptions where the judgment

sought to be enforced is defective for lack of jurisdiction over the parties or the subject matter. Such a judgment is void and unenforceable in its own state or any other state. State v. Johnston, 17 Wn.App. 486, 564 P2d 1159 (1977); Industrial Finance Co. v. Lovell, 9 Wn.App. 829, 515 P2d 1304 (1973); Brown v. Brown, 46 Wn.2d 370, 281 P2d 850 (1955); Williams v. Steamship Mut. Underwriting Ass'n Ltd., 45 Wn.2d 209, 273 P2d 803 (1954); Maple v. Maple, 29 Wn.2d 858, 189 P2d 976 (1948).

The Virginia court that rendered the respondent's judgment is a general district court as authorized by the Virginia Code, VA. CODE §16.1-69.7:

> In every city and county there shall be one court which shall be called the ... General District Court....

Under VA. CODE §16.1-69.6(4) & (7), the General District Courts of the cities of Newport News and Norfolk are respectively designated the fourth and seventh districts.

They have entirely separate territorial limits.

These courts are courts not of record and of limited territorial jurisdiction. Since a court of limited jurisdiction derives all its jurisdiction from statutes, it can exercise only that jurisdiction expressly conferred on it. Addison v. Salyer, 40 S.E.2d 260 (S.C. App. VA 1946). VA. CODE §16.1-77 limits the jurisdiction as follows:

> "Each general district court shall have, within the limits of the territory it serves, civil jurisdiction as follows...."

VA. CODE §16.1-79 requires warrants to be served by the sheriff or other officer authorized to serve process within a county or municipal corporation. VA. CODE §8.01-295 limits the territory in which a sheriff may serve process. From these statutes and the other pertinent sections of the Virginia Code, volumes 2 and 4, and

court rules, it is clear that Norfolk General District Court has limited territorial jurisdiction as to both subject matter and persons. It does not have concurrent jurisdiction with another general district court. VA. CODE §16.1-77(1).

Subject matter jurisdiction is limited by the fact that, under the annotations to VA. CODE §16.1-77, the general district court judge is the successor to the former office of justice of the peace. The case of Western Union Tel. Co. v. Pettyjohn, 13 S.E. 431 (S.C. App. VA 1891), held that a justice of the peace has no jurisdiction to adjudicate a civil penalty violation occurring outside his territorial district.

In this regard, note that the entire transaction between the parties here took place in Newport News, not Norfolk. The

only connection with Norfolk is the location of the bank's credit recovery department. This department had no part in the transaction and was not involved until after Mr. Williams left the state. Thus the bank brought its action in the wrong General District Court, and the Norfolk court's orders herein should be vacated as void for lack of subject matter jurisdiction.

As to personal jurisdiction, VA. CODE §16.1-77 does not distinguish it from subject matter. All of a general district court's jurisdiction is restricted to persons residing within its territory. The state's long-arm statute, VA. CODE 8.01-328.1, cannot extend the jurisdiction provided for general district courts. That statute merely states:

"When personal jurisdiction over person may be exercised. A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the

person's:

1. Transacting any business in this Commonwealth...."

The "court" referred to in the long-arm statute cannot include general district courts without a specific reference to such courts because courts of limited jurisdiction require specific legislative authority for their jurisdiction and functions. Addison v. Salyer, supra. Since the Norfolk court needs specific statutory authority for its functions, Addison v. Salyer, supra, it follows that it lacks authority to use the long-arm statute. In addition, the type of process used here, the "warrant of debt," is also not mentioned in the long-arm statute. VA. CODE 8.01-329. Clearly the Virginia legislature did not intend for district court warrants to be used under this statute.

In summary, the use of Virginia's long-arm statute must comply with the federal requirement of due process. Hum-

phreys v. Pierce, 512 F.Supp. 1321 (W.D. VA 1981). Here the court went beyond its subject matter and beyond its personal jurisdiction, without any waiver under the statute and using a procedure not specifically authorized by statute. There is a clear violation of the due process clause. U.S. CONST. Amend. V, Amend. XIV, §1.

This Court is uniquely endowed with the experience and authority to weigh constitutional values and enforce constitutional safeguards. When the States of Washington and Virginia are unwilling to assure their citizens the required procedural due process safeguards, the injured party must turn to our nation's highest Court for justice. For these reasons it is urged that the Washington trial court's order enforcing the Virginia judgment be vacated.

c. The Washington Superior Court

judgment and the Virginia judgment are void for insufficient notice by the Virginia court.

The "warrant in debt" process used here, as authorized by VA. CODE §16.1-79 and VA. CODE §16.1-80, requires only five days for the defendant to appear and defend. Is this a reasonable opportunity to defend? The importance of such an opportunity is well established. Restatement of Conflict of Laws §25, Comment h. While five days is perhaps reasonable within the territorial limits of Norfolk and perhaps unreasonable for the rest of Virginia, this Court has already spoken on its interstate aspect. In Roller v. Holly, 176 US 398, 413, 20 S.Ct. 410, 44 L.Ed. 520 (1900), the Court held that five days between service and return was not reasonable notice or due process of law in an action brought in Texas against a Virginia

resident. Roller is cited in the often-cited case of Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 70 S.Ct. 652, 94 L.Ed. 865 (1949), which reaffirms this due process requirement.

d. Virginia's long-arm statute, which sets no time limit for service on the out-of-state defendant, violates the due process clause of the U.S. Constitution.

The Restatement cites other pertinent cases. Holland Furnace Company v. Willis, 149 S.E.2d 93 (1966) similarly involved a court of limited jurisdiction and service on a nonresident via the Secretary of State. The court held that due process was denied because there was no statutory guarantee of a reasonable time to defend after service, even though the actual notice was 19 days. The court observed that there was no time limit for service

on the Secretary of State and no prescribed time for defending after such service. See also Stubbs v. Hamilton, 135 N.W.2d 540 (1965), where the court held that due process required the allowance of 20 days for a nonresident parent to appear in a child dependency proceeding.

This case presents the same procedural defects found lacking in due process in Holland Furnace, supra. VA. CODE §8.01-329. That case discusses another defect also found in the Virginia long-arm statute, VA. CODE §8.01-329, making the procedure violative of due process. That defect is the lack of a prescribed time for the Secretary of State to mail the copy of the process or notice to the defendant. The statute says "forthwith," a notably imprecise and vague term.

DATED May 16, 1984.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

(SEPARATELY PRESENTED)